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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether section 202(c) of the Natural Gas Policy Act of 1978 ("NGPA") violates Article I, Section 7 of the Constitution by establishing a procedure, other than the procedure for enactment of legislation, for legislative review of rules proposed pursuant to novel and experimental delegated authority.

2. Whether section 202(c) of the NGPA, which establishes a procedure for Legislative Branch review of legislative rules of an agency which is independent of presidential control, violates the principle of separation of powers by infringing on the power of the President under Article II to faithfully execute the laws or the power of the Judiciary under Article III to adjudicate cases or controversies.

3. Whether respondents have standing to challenge the constitutionality of section 202(c), where the inseverability of the legislative review procedure eliminates any statutory basis for the grant of relief by the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United States Senate respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 29, 1982.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–104a)[1] is reported at 673 F.2d 425. The rule proposed by the Federal Energy Regulatory Commission ("FERC") in Order No. 80 (App. 123a–195a) is published at 45 Fed. Reg. 31622 (1980). The decision of the Federal Energy Regulatory Commission denying rehearing and revoking Order No. 80 (App. 196a–

[1] References to "Appendix" or "App." are to the Appendix to Jurisdictional Statement submitted April 29, 1982, by The Process Gas Consumers Group, et al., in a related case, No. 81-2008.

The other parties to the proceeding in the court of appeals are set forth at pages ii–iv of the Jurisdictional Statement of The Process Gas Consumers Group, No. 81-2008. The United States, the United States Senate, and the United States House of Representatives, which had appeared in the court of appeals as amici curiae, were granted leave to intervene after judgment (App. 105a).

203a) is reported at 45 Fed. Reg. 54741 (1980), and its decision denying rehearing of the revocation of Order No. 80 (App. 204a–207a) is reported at 45 Fed. Reg. 71780 (1980).

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1982 (App. 208a–209a). On March 10, 1982, the court of appeals denied the petition for rehearing filed by the American Gas Association (App. 210a). On May 13, 1982, the Chief Justice granted the application of the Senate for an extension of time to file a petition for certiorari, and ordered that the time for filing be extended to August 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution and the Natural Gas Policy Act of 1978 are set forth in the Appendix (App. 222a–231a).

STATEMENT

After eighteen months of strenuous effort to resolve the enormously divisive and controversial issues created by the energy crisis, Congress enacted the Natural Gas Policy Act of 1978 ("NGPA") as part of a five-part package of energy legislation. In the years before the NGPA, severe supply shortages and high price increases for natural gas struck the economy with devastating force.[2] This impact compelled a legislative effort to increase the supply of gas, and to experiment with a novel scheme of regulation to distinguish between high- and low-priority users of natural gas.[3]

Of the NGPA's two key titles, Title I provides for gradually increasing wellhead natural gas prices and brings intrastate gas production under federal price regulation for the first time.

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[2] At the worst point, in February 1977, a combination of factors including a harsh winter produced natural gas supply shortages so severe that an estimated 1.2 million workers were idled. See Comptroller General, Natural Gas Plan Needed to Provide for High-Priority and Critical Uses 4 (1981).

[3] High-priority users include residential consumers and industries dependent on gas for use as the feedstock for chemical synthesis, and in other industrial processes. Low-priority users burn gas, instead of coal, as "boiler fuel" to generate steam or electricity.

Title II, 15 U.S.C. 3341–3348 (Supp. IV 1980), establishes a two-phase program for "incremental pricing." Under such pricing, all users of natural gas do not pay the same price. Instead, some industrial users pay a disproportionate share of the price increases, by paying a surcharge based on the "increment" of cost for tapping new sources of gas. Proponents of incremental pricing hoped that it would be a "market ordering" device, whereby industrial users would signal their displeasure with large price increases to encourage their pipeline suppliers to pay less for new sources of supply. Proponents of incremental pricing also hoped to shield residential and small commercial natural gas users from large price increases, by shifting part of the charge for such increases onto industrial users (App. 8a–9a and n. 10).

Because Congress was reluctant to proceed on a mandatory basis with full-scale incremental pricing, Title II of the NGPA divided incremental pricing into two phases. Section 201 of the NGPA directs the Federal Energy Regulatory Commission ("FERC") to establish a first phase ("Phase I"), under which an incremental pricing surcharge would be passed to low-priority industrial boiler fuel users. That phase, which was mandatory and certain, was to be implemented by November, 1979 without legislative review.

Section 202 of the NGPA creates the option of expanding incremental pricing to a second phase ("Phase II") in which incremental cost surcharges are also charged to high-priority industrial users. This two-phase structure reflected a key congressional distinction between low-priority boiler fuel use of natural gas, a "wasteful" use which Congress was determined to restrain in response to the energy crisis, and high-priority industrial gas uses, which Congress could not restrain without risk to the national economy.[4] The NGPA directed FERC to

[4] In a key early bill reported by the Senate Committee on Commerce, incremental pricing for boiler fuel use was intended "[a]s a complement to the mandatory boiler fuel use phaseout provision." S. Rep. No. 907, 94th Cong., 2d Sess. 16 (1976). This complementary arrangement was targeted at boiler fuel uses "to discourage such wasteful uses of natural gas. . . ." *Id.* at 29.

produce a "proposed" [5] Phase II amendment to the Phase I rule by May, 1980. Unlike Phase I, the Phase II proposal was to take effect only after it was transmitted to the House of Representatives and the Senate. If either House disapproved the proposal, then under Sections 202(a) and (c) of the NGPA, Phase II would not go into effect; only Phase I would remain in effect. Like many other legislative review mechanisms of the modern era,[6] the two-phase division of incremental pricing enabled Congress to delegate necessarily flexible and experimental authority, while insuring that the exercise of such authority would be accountable through democratic processes.

As required by the NGPA, in 1979 FERC established a Phase I rule for boiler fuel use of natural gas. However, various developments after adoption of the NGPA diminished the basis for expanding the Phase I rule to a second phase.[7] On March 20,

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[5] Section 202(a)(1) provides that "the Commission shall, by rule, prescribe an amendment to the rule required under Section 201. . . ." The sole legislative history explaining this language—the conference report on section 202—describes the Commission's promulgation as a proposal three times:

> The section provides a Congressional review mechanism by which either the Senate or the House of Representatives may adopt a resolution of disapproval of any amendment *proposed* by the Commission under this section. The amendment will take effect only if not disapproved by either House of the Congress within 30 calendar days of continuous session after it has been submitted. If the amendment required by sec. 202(a) is disapproved, after six months the Commission may submit additional *proposals*. Authority to submit *proposals* extends for a 2-year period beginning at the time of the adoption of the first disapproval resolution.

House Conference Rep. No. 1752, 95th Cong., 2d Sess. 96–97, *reprinted in* 1978 U.S. Code Cong. & Ad. News 8983, 9013 ("Conference Report"). (Emphasis supplied.)

[6] See pp. 9–12 *infra*.

[7] Two developments diminished the basis for Phase II. First, in 1979, world oil prices doubled (App. 114a, 142a). Under the NGPA, the ceiling on the incremental pricing surcharge was tied to the price of oil, the alternative fuel to natural gas. Thus, the rise in the price of oil increased the potential charges to users of natural gas to levels that might create grave problems. Second, most states used regulatory authority reserved to them by the NGPA to adopt "state-level incremental pricing" which shifted surcharges from

1980, FERC gave advance notice of its Phase II proposal to Congress, and on May 6, 1980, it gave formal notice.[8] On April 3, the Subcommittee on Energy and Commerce of the House Committee on Interstate and Foreign Commerce (respectively "House Subcommittee" and "House Committee") began hearings on the proposal. The Chairman of FERC, Charles B. Curtis, testified at the hearings accompanied by the entire Commission. After explaining why a second, expanded phase would not achieve the prime intended goal of incremental pricing, the FERC Chairman explained "[t]herefore, we have a certain lack of enthusiasm for it, if that is a fair judgment." *House Incremental Pricing Hearings, supra* note 8, at 383.

After the House Subcommittee completed hearings, it and the House Committee recommended that incremental pricing not be expanded to a second phase. In a complete report, the "committee accept[ed] the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish" the goals of bringing greater order to the natural gas market and shielding consumers from gas costs (App. 120a).[9] After debate, on May 20, 1980, the House adopted House Resolution 655, 96th Cong., 1st Sess., a resolution under section 202(c) to disapprove the Phase II proposal, by a margin of 369 to 34. The committee report and the debate focused on factors showing that expanding the program would not

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their own consumers to industries in other states and distorted the impact of incremental pricing (App. 152a).

[8] *Phase II Incremental Pricing of Natural Gas: Hearings Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 1, 202 (1980) ("*House Incremental Pricing Hearings*").

[9] The committee report relied on FERC's own analysis concerning what Chairman Curtis had called FERC's "lack of enthusiasm" for the rule. The committee's report analyzed the background and purposes of incremental pricing, App. 107a–111a, and the FERC proposal, *id.* at 112a–120a. It stressed the changed market conditions (including the doubling of oil prices) since adoption of the NGPA, *id.* at 114a–115a and the reasons, including state-level incremental pricing, *id.* at 117a–118a, that incremental pricing would not achieve the goals of incremental pricing.

achieve the law's goals.[10] Consistent with the decision of Congress in 1978 that expansion of incremental pricing should be optional, the House concluded that under current conditions the option to expand incremental pricing, thereby imposing higher energy costs on high-priority industrial gas users, should not be exercised.

After the House decision, respondents sought rehearing by FERC of the part of its order stating the expanded rule would not become effective if disapproved by Congress. On rehearing, FERC declined to rule on the constitutional issue raised by respondents. It revoked its own proposal for a second phase, noting "that we might well have very serious reservations as to the wisdom of making the Phase II rule effective" (App. 199a–200a).

Respondents petitioned the United States Court of Appeals for the District of Columbia Circuit for review. On January 29, 1982, the court of appeals declared section 202(c) unconstitutional. The court reached the question of constitutionality by finding the statutory provision for legislative review to be severable from the provision for a second phase, on the theory "that Congress would have enacted section 202 in the absence of the legislative review provision in subsection (c)" (App. 24a). In striking down the legislative review provision, the court of appeals declared that "[t]he primary basis of [its] holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress" (App. 37a). The court of appeals also found that legislative review "contravenes the separation of powers principle. . . ." *Id.*

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[10] *See* note 7 *supra;* 126 Cong. Rec. H3849 (daily ed. May 20, 1980) (Rep. Stockman) ("vastly changed market for alternative petroleum fuels that could not simply have been anticipated at the time"); *id.* at H3854 (Rep. Ashley) (prices of oil "have virtually doubled. . . . Consequently, any such [incremental pricing] rule risks the serious economic dislocations I have mentioned"). Several Congressmen noted that the high ceiling for incremental gas prices, which resulted from the doubling of oil prices, might cause industry relocation to exploit regional gas price disparities, see *id.* at H3848–3849 (Rep. Hillis), *id.* at H3853 (Rep. Benjamin), *id.* (Rep. Quayle).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT SECTION 202 IS UNCONSTITUTIONAL.

The court of appeals struck down section 202(c) of the NPGA on two bases. Primarily, the court held legislative review to be unconstitutional because such review "changed the law" (App. 74a) without following the procedures for enactment of new legislation. Also, the court held that legislative review violated the principle of separation of powers because the Congress had intruded into the spheres of the Executive and the Judiciary (App. 88a, 100a). On both of these grounds, the decision of the court of appeals warrants review and reversal by this Court.

1. LEGISLATIVE REVIEW DIFFERS FROM ORIGINAL ENACTMENT.

The court of appeals cited as its primary ground that legislative review violated Article I, Section 7 of the Constitution, which establishes "prerequisites to *the enactment of federal laws:* bicameral passage of the legislation, and presentation for approval or disapproval by the President" (App. 55a) (footnotes omitted and emphasis supplied). The court noted that the adoption of a legislative review resolution by a House of Congress "differs from enactment of a statute which obviously must comply with Article I, Section 7," because "a resolution of disapproval does not amend the statutory language. . . ." (App. 81a). The court also noted that the primary purpose of the Article I, Section 7, procedure for presentation to the President "was to give the President a defensive weapon against legislative intrusions" (App. 64a), but it observed that this "defensive purpose of the presidential veto was fulfilled by the President's opportunity to veto the NGPA in 1978" (App. 72a). Nevertheless, the court decided to equate legislative review with enactment of new legislation for purposes of the procedural requirements of Article I, Section 7, because it believed that legislative review "changed the law" (App. 74a).

Article I, Section 7, sets forth requirements for Congress to enact new legislation or to change prior legislation. If there is no "change" of previously enacted law, there is no need to go through the enactment process a second time; as the court of appeals implicitly recognized, the elaborate requirements of bicameral approval and presentation apply only to such change. Both the wording of Article I, Section 7, and the history that led to its adoption, show that the Framers were concerned only with the methods for enacting new legislation or changing previously enacted law.[11] As to whether legislative review pur-

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[11] The background of Article I, Section 7, shows that the Framers were only concerned with the methods for enacting new legislation. At the Constitutional Convention, Article I, Section 7, Clause 3, the Presentation Clause, originated with a proposal by James Madison. Madison feared that the Congress would follow the practice of the Pennsylvania legislature and evade the procedure for enacting new legislation by enacting "resolves" instead of bills. The "resolve" was well-recognized as a specialized type of legislation. *See* L. S. Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America § 752, at 297 (1856) ("A resolve . . . is the form generally adopted in this country, when administrative, local, or temporary laws are to be passed.")

Framers repeatedly referred to a report by the Council of Censors in Pennsylvania in 1784 that showed how Pennsylvania's constitutional system of checks and balances had been upset. See 5 J. Elliott, Debates on the Adoption of the Federal Constitution 430 (1968 ed.) (reference by G. Morris to report just before debate on Presentation Clause); J. Madison, The Federalist No. 48, at 346, and No. 50, at 353 (Wright ed. 1974) (referring to the same report). That report described the main method by which Pennsylvania's checks and balances for enacting legislation had been upset: "by the exercise of a power assumed by the General Assembly to make laws and to alter laws, and to appropriate the lands, goods and money of the Commonwealth by RESOLVE only, which so far from being published for consideration, and deferred to the next session, is passed secretly and immediately." A Report of the Committee of the Council of Censors. . . . 15 (1784).

Accordingly, Madison proposed that the provision specifying the procedures for enacting "bills" be amended to add the phrase "or resolves." 5 J. Elliott, *supra* at 431. His proposal was "thrown into a new form" the day after he made it and was adopted as Article I, Section 7, Clause 3. *Id.* In light of the clear understanding at the time that the resolve was a type of proposed new legislation akin to the bill, the Framers' evident intent in adopting the constitutional provision was thus to constrain the methods for enacting new legislation.

suant to previously enacted law should be considered a "change" of that law, however, neither the express language of Article I, Section 7, nor the explanations of the Framers, offer guidance. Prior to the twentieth century, the only discussion of this issue at all was an opinion of the Attorney General in 1854, in which he found action by one House pursuant to previously enacted legislation to be constitutional, in marked contrast to action by one House without previously enacted legislation. 6 Op. Att'y Gen. 680, 683 (1854).

Thus, this issue is one of those Justice Jackson contemplated in observing that "[a] judge, like an executive adviser may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power. . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion). As Justice Frankfurter explained, in resolving such an issue, the courts must not "disregard the gloss which life has written" upon "the words of the Constitution," for while "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . . they give meaning to the words of a text or supply them." *Id.*, 343 U.S. at 610 (concurring opinion). The historical development of legislative review shows that it has served a sound and vital function quite different from the court of appeals' assumption that legislative review was a way to "change" the law. Rather, legislative review has served traditionally as an integral part of legislation delegating broad authority. It has drawn its force and effect, not from any effort by a later Congress to "change" previously enacted law, but from the intent of the Congress enacting the original authority to limit what it is delegating; not from any effort by a later Congress at "reconsideration" of previously defined policy, but from the policy of the Congress enacting the original authority to assure that the exercise of novel or experimental authority will be subject to democratic accountability.

Legislative review developed in response to the unprecedented national problems of the Depression and World War II. Dealing with those problems required Congress to make sweeping delegations of authority of unprecedented breadth. While this

Court upheld those broad delegations,[12] it recognized, and continues to recognize, the tension between the grant of broad authority to the President or an agency, and the Framers' expectation that Congress would be the maker of national policy.[13] Congress responded to this same tension in 1939 when it delegated to the President the broad authority he sought to reorganize the Depression-spawned agencies,[14] and when it delegated the sweeping statutory authority required to prosecute World War II,[15] by subjecting the exercise of that delegated authority to legislative review. In this way, Congress coupled necessary grants of broad authority with a mechanism assuring a measure of democratic control over otherwise excessive delegations.

After a decade of familiarity with legislative review, the Truman Administration endorsed it in 1949 with an opinion of the Justice Department rejecting the theory that legislative

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[12] *See, e.g., Lichter* v. *United States*, 334 U.S. 742 (1948); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

[13] *See Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion) (noting danger of statutory construction that delegates sweeping authority); *id.* at 685–87 & nn. 6–7 (Rehnquist, J., concurring) (citing commentary on delegation doctrine).

[14] Congress had temporarily delegated reorganization authority with provision for legislative review, in the Economy Act of 1933, ch. 314, 47 Stat. 382, 413 (1932). After the New Deal led to a proliferation of government agencies, Congress debated renewal of reorganization authority for several years and ultimately enacted a renewal in the Reorganization Act of 1939, ch. 36, 53 Stat. 561 (1939). Just as the earlier reorganization authority had been challenged for excessive delegation, *see Isbrandtsen-Miller Co.* v. *United States*, 300 U.S. 139, 148 (1937), the issue of excessive delegation was extensively debated before passage of the 1939 Act. See D. G. Morgan, Congress and the Constitution: A Study of Responsibility 184–203 (1966).

[15] Over thirty statutes were passed during World War II delegating extensive authority over matters such as price control, subject to termination by concurrent resolution of both Houses of Congress. *See Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 542 n.7 (1954)) (price control statute); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1089–90 (1975) (listing statutes).

review was equivalent to enactment of new legislation.[16] For the following quarter of a century, while the Executive opposed legislative review by Congressional *committees*, it largely accepted legislative review by the Houses of Congress as a means for balancing necessarily broad delegations of authority with democratic accountability. Legislative review was assigned that balancing function in legislation initiating, or responding to, the Truman Doctrine, the Korean War, the Middle East Crisis of 1957, and the Vietnam War,[17] as well as legislation responding to a host of novel domestic problems or concerns.[18] Congress employed legislative review for that key balancing function in pillars of government authority such as the Congressional Budget and Impoundment Control Act of 1974, the National Emergencies Act, and the War Powers Resolution.[19]

Legislative review served the same balancing function in legislation responding to the energy crisis of the 1970's. The 1973 Arab oil embargo commenced a series of national energy crises, including economic shocks from price increases and severe economic disruptions from natural gas shortages. See

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[16] Department of Justice, *Memorandum Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in Reorganization Act of 1949*, S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949).

[17] Assistance to Greece and Turkey, ch. 81, 61 Stat. 103 (1947) (Truman Doctrine); Universal Military Training and Service Act, ch. 144, 65 Stat. 75, 80 (1951) (conscription during Korean War); Resolution to Promote Peace and Stability in the Middle East, Section 6, 22 U.S.C. 1965 (Middle East Crisis of 1957); H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88–408, 78 Stat. 384 (1964) (Tonkin Gulf Resolution), *repealed*, Pub. L. No. 91–672, Section 12, 84 Stat. 2053, 2055 (1971).

[18] *See, e.g.*, Regional Rail Reorganization Act of 1973, Section 208, 45 U.S.C. 718 (bankruptcy of Northeast railroads); National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, Section 302, 72 Stat. 433 (1958) (space program); District of Columbia Self-Government Act, Pub. L. No. 93–198, Section 604, D.C. Code Ann. 1–207 (1981).

[19] Respectively, Pub. L. No. 93–344, Section 1013, 31 U.S.C. 1403; Pub. L. No. 94–412, Section 202, 50 U.S.C. 1622; Pub. L. No. 93–148, Section 5, 50 U.S.C. 1544.

note 2, *supra*. Congress recognized early in this period that the energy crisis again raised the recurrent "problem of finding a means by which a legislative body in a democratic republic may extend extraordinary powers for use by the Executive during times of emergency without imperiling our Constitutional balance of liberty and authority." [20] Based on its contemporary investigation of the use of emergency authority,[21] Congress was reluctant to grant President Nixon's request for unchecked emergency authority over energy use. Instead, it concluded that legislative review through the "congressional disapproval mechanism . . . provides the best opportunity for resolution of this problem." *Id.* Legislative review became the critical component for balancing a host of broad statutory delegations concerning energy rationing, contingency plans, strategic oil reserves, allocation of energy production materials, oil exports, and naval reserve production.[22] Thus, when the conference committee on the NGPA faced the need to delegate authority for the novel experiment of incremental pricing of natural gas, it had a history of legislative review provisions in enactments delegating energy authority on which to draw.

Both the legislative history of the NGPA, and the record of the 1980 House disapproval of the Phase II proposal, show that legislative review served as an integral part of the delegation of authority in the original law, rather than as a means of post-enactment "change" of that law. Congress was highly

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[20] National Energy Emergency Act of 1973, H.R. Rep. No. 763, 93d Cong., 2d Sess. 41 (1974). This bill would have delegated authority for mandatory energy conservation, rationing, and conversion of boiler facilities from natural gas and oil to coal. President Nixon vetoed the bill, but most of the authority proposed in the bill was enacted in subsequent energy legislation providing for legislative review.

[21] *See National Emergency: Constitutional Questions Concerning Emergency Powers, Hearings Before the Senate Special Comm. on the Termination of the National Emergency*, 93d Cong., 1st Sess. (1973).

[22] Naval Petroleum Reserves Production Act of 1976, 10 U.S.C. 7422(c)(2)(C) (naval reserve production); Energy Policy and Conservation Act, 15 U.S.C. 757 and 760a, 42 U.S.C. 6239 and 6261 (petroleum pricing controls and product allocation, strategic oil reserves, and rationing and contingency plans); Federal Nonnuclear Research and Development Act of 1974, 42 U.S.C. 5911 (allocation of energy production materials); Act of November 16, 1973, 30 U.S.C. 185(u) (oil exports).

reluctant to make an unlimited delegation of authority for full-scale incremental pricing. As another panel of the court of appeals noted, "[t]he incremental pricing scheme Congress adopted in the NGPA was novel and experimental, and viewed with some trepidation by many members who feared it would bring in its wake massive switching to non-gas fuels, regional dislocations of industry, and a bureaucratic orgy." *Ohio Association of Community Action Agencies* v. *FERC*, 654 F.2d 811, 820 (D.C. Cir. 1981). Thus, an integral part of the delegation by Congress of authority for incremental pricing was the two-phase procedure that made expansion of it to high-priority industrial users optional. See pp. 18–19 *infra*. Legislative review, far from being a means for changing the law, was an expression of the original concern of Congress, at the time it enacted the NGPA, about delegating unchecked authority for incremental pricing.

The House's disapproval in 1980 of the proposal to expand incremental pricing illustrates that legislative review served purposes other than "changing" the previously enacted law. The committee report recommending disapproval, the debate on disapproval, and the House vote on disapproval all showed that in 1980 the House was not reconsidering its decision eighteen months earlier to enact an optional incremental pricing program. Rather, the House responded to factors showing that exercising the option created by the 1978 law would not achieve the law's original goals. That report and debate, which drew heavily on FERC's own analysis, explored how counterproductive incremental pricing would be in light of developments since 1979. See nn. 9 and 10, *supra*. Far from undoing the law, legislative review confirmed the judgment of Congress in 1978 to make optional Phase II of the novel and experimental authority in the law.

2. LEGISLATIVE REVIEW IS CONSISTENT WITH THE FUNCTIONS OF THE BRANCHES.

As an additional ground for its decision, the court of appeals held that legislative review violated the principle of separation of powers. The court of appeals considered rulemaking to be an

"executive" function (App. 92a n.203), and deemed legislative review unconstitutional because it "may give Congress the power to control the agency's discretion in considerable detail" (App. 90a). The court concluded that "this case presents an example of extreme disruption of the normal administrative process" (App. 95a).

The court of appeals' reliance on separation of powers as an alternative ground at least has the virtue of judging the legislative review provision based on its concrete impact. In this respect, the ground of separation of powers contrasts favorably with the sweeping interpretation of Article I, Section 7, advanced by respondents in the court below. Under that sweeping interpretation, respondents would invalidate numerous legislative review provisions in the many special and sensitive contexts where Congress and the President have used them throughout the post-World War II era to accommodate this need for coordinated action.

However, section 202(c) is fully consistent with the separation of powers. To the extent that this Court has assigned rulemaking to any particular category, it has not considered it an "executive" function, as the court of appeals did. Rather, this Court repeatedly held rulemaking to be legislative in nature; agencies or even courts vested with rulemaking power are deemed to act in a "legislative" capacity. *See, e.g., Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 441 (1923).

When Congress subjected incremental price rulemaking to legislative review, it did not authorize review of another branch's "constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). A different case would be presented by legislative review of agency action in an executive or judicial capacity, such as adjudicating particular natural gas cases, or prosecuting particular gas producers, or appointing natural gas regulatory commissioners. *Cf. Buckley* v. *Valeo*, 424 U.S. 1 (1976) (appointment power reserved as an Executive function). Here, Congress reviewed no constitutionally assigned executive or

judicial function. The impartial legal judgment of the adjudicator, and the skills of the administrator, shape the making of particular decisions and legitimize the application of rules to particular individuals. Yet, here, the matter at issue was not the application of rules, but the policy issue of whether to create major experimental general rules at all. At its heart, that decision involved the potential sacrifice of some groups' interests for the welfare of the nation as a whole. To legitimize such decisions concerning the balancing of group economic interests does not call for executive or judicial judgment, but for the participation of the polity through the democratic process of its elected representatives. It turns the separation of powers doctrine on its head to exclude the legislature from responsibility for precisely the kind of economic and social policy judgment which is legislative in nature, requiring as a matter of constitutional law that unelected and unaccountable administrators make that legislative decision.

Moreover, democratic accountability for FERC rulemaking did not "preven[t] the *Executive Branch* from accomplishing its constitutionally assigned functions," *Nixon* v. *Administrator of General Services*, *supra*, 425 U.S. at 443 (emphasis supplied), because it did not affect a matter under presidential control. In recent years, as the relation of major rulemaking to national policy has become increasingly evident, successive presidents have mandated presidential review of rulemaking by Executive Branch agencies.[23] However, natural gas pricing has not been subject to such presidential review; since 1938, natural gas price regulation has been conducted by FERC and its predecessor agency, both of which have been beyond Executive Branch control. FERC, like "[t]he Federal Trade Commission . . . cannot in any proper sense be characterized as an arm or an eye of the executive . . . and . . . [it] must be free from executive control." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935).

For independent agencies, the elaborate rulemaking review apparatus developed by successive presidents does not provide

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[23] Executive Order 12299, 46 Fed. Reg. 13193 (1981); Executive Order 12044, 43 Fed. Reg. 12661 (1978); Executive Order 11821, 39 Fed. Reg. 41501 (1974).

any of the democratic accountability necessary to the proper exercise of major, novel and experimental rulemaking authority. Only Congress can. The Executive Branch itself recognizes that this renders legislative review of independent agency rulemaking especially appropriate. As that Branch's spokesman testified before the congressional committee studying the matter, from "the standpoint of policy this Administration has no reservations about a legislative veto applying to the select independent agencies. The President . . . has indicated a desire to consider legislative veto types of mechanisms as a policy matter over the independent agencies. He is not in favor of legislative veto over executive branch agencies, agencies under his direct supervision and control." *Regulatory Reform Legislation of 1981: Hearings Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 15 (1981) (statement of James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget).[24]

Legislative review accords well with the separation of powers in other respects. Legislative review does not "control the agency's discretion in considerable detail" (App. 90a), or produce "extreme disruption of the normal administrative process" (App. 95a), or create an "[i]ntrusion into the judicial sphere" (App. 101a), as the court of appeals suggested. Rather, the process by which the incremental pricing decision was made was sound and orderly, and it respected the administrative and judicial spheres. Without control or interference from Congress, FERC employed its technical expertise to prepare the complex proposed rule showing how incremental pricing might be extended to high-priority industrial gas users. All the details of that scheme were worked out by FERC, and its execution would also have been left to FERC. FERC laid that rule before Congress, not for detailed control nor for disruptive interference, but for a single, discrete legislative judgment. In fact, at the congressional hearings on whether Phase II should go into effect, the FERC Chairman, Charles B. Curtis, accompanied by the entire Commission, testified that "I believe, and I think my

[24] The Executive took this position "notwithstanding the question of the constitutional issues or the legal issues . . . [which] should be tested out in the courts." *Id.*

colleagues share my belief that the Congress is the proper forum for making that judgment. . . ." *House Incremental Pricing Hearings, supra* note 8, at 367.

The court of appeals conjectured that if Congress had not disapproved the rule, the judiciary would have been "presented with a difficult question of how much weight, if any, to give to the implicit congressional finding. . . ." in favor of the rule (App. 101a). But the courts would have resolved that question just as this Court resolved the same question this past term regarding two other rules reviewed and not disapproved by Congress. *See North Haven Bd. of Education* v. *Bell*, 102 S. Ct. 1912, 1923–24 (1982); *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 102 S. Ct. 38, 43 (1981). In both cases this Court accorded the fact that the rule had been reviewed and not disapproved by Congress some weight, but not great weight. In neither case did this Court express any difficulty with the relationship between legislative and judicial review of the same rule, and there is no such difficulty. Legislative review provides democratic accountability of policy decisions; judicial review provides definitive judgments on legal authority. The two are perfectly compatible.

II

THE DECISION OF THE COURT OF APPEALS ON SEVERABILITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The court of appeals granted respondents standing to challenge legislative review by severing legislative review from the provision authorizing Phase II.[25] Its decision severed legislative review by applying the novel criterion that Congress "would have" enacted Title II even without legislative review (App. 28a). The potentially sweeping effect of this criterion and its fundamental error warrant review and reversal by this Court.

In the past forty years, Congress has delegated broad powers

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[25] If legislative review were not severable, respondents could obtain no relief from their suit, and would therefore lack standing. Relief would be unobtainable because success in their challenge would eliminate all of Phase II as an inseverable unit, including the provisions which provide the benefits that they seek.

to administrators for responding to novel or intractable problems only because exercise of those broad powers was subject to legislative review. In many instances "the legislative veto has been the key to getting the very delegation of authority the executive wants." J. Sundquist, The Decline and Resurgence of Congress 356 (1981). In the particular context of energy regulation, legislative review has been the key to delegation of a host of broad powers.[26] Without addressing the severability of each such provision, the test applied by the court of appeals would allow administrators to assert that the extraordinary powers to make war, defer spending, declare emergencies,[27] and make national energy policy should be severed from a legislative review provision which was the key to their enactment, and which furnishes the democratic check on their exercise—merely on speculation that Congress "would have" delegated such broad powers without legislative review.

Title II's structure and legislative background show that Congress never intended that the authority for expansion of incremental pricing be exercisable severed from legislative review. Title II bifurcates incremental pricing into two phases. The first phase under section 201 regulates boiler fuel use. The second phase under section 202 expands incremental pricing to other, high-priority industrial uses. Aside from a six-month interval between their commencements, the key difference between the two phases is that that the second phase was to be effectuated *only* as provided in the legislative review provision. *Compare* section 201 *with* section 202. To sever legislative review does not merely alter the statute; it obliterates Title II's essential structure and logic.

The legislative background shows Congress had strong reasons to devise a compromise for Title II with that structure.

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[26] These include the powers to trigger rationing and other contingency plans responsive to energy shortages, section 201 of the Energy Policy and Conservation Act, 42 U.S.C. 6261; the power to implement a plan for a strategic petroleum reserve, section 159 of that Act, 42 U.S.C. 6239; the power to raise prices for regulated oil beyond the fixed ceilings, section 401, 15 U.S.C. 757; and the power to assume exclusive authority to make purchases of oil from foreign countries, section 456, 15 U.S.C. 760b.

[27] See 50 U.S.C. 1544; 31 U.S.C. 1403; 50 U.S.C. 1622.

In several laws responding to the energy crisis, Congress mandated strict restraints for low-priority boiler fuel uses of natural gas, but not for high-priority industrial uses.[28] It continued the same distinction when considering incremental pricing, finding that boiler fuel use was a "wasteful" use of natural gas,[29] in contrast to high-priority uses for which there are often no practical substitutes for natural gas. The conference committee was required to deal with the sharp difference between the two Houses regarding incremental pricing,[30] and the general congressional "trepidation" about such pricing, *Ohio Association of Community Action Agencies* v. *FERC*, 654 F.2d 811, 820 (D.C. Cir. 1981). It naturally structured its compromise along the long-standing distinction between low- and high-priority industrial uses.

Thus, the court of appeals obliterated the structure which had resolved major congressional differences and doubts, and by extinguishing that structure, the court eliminated the statute's adherence to a consistent congressional policy regarding natural gas priorities. The court's chief justification for doing so was that, regardless of what Congress actually adopted, had Congress been unable to adopt a legislative review provision it "would have enacted" a program for two

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[28] *See* 15 U.S.C. 792(a); 42 U.S.C. 8312 (Supp. IV 1980).

[29] See note 4 *supra*.

[30] The House and Senate differed sharply on altering a forty-year-old policy against federal intrusion into local price regulation. A key element of incremental pricing which distinguishes it from the previous federal regulation of natural gas prices is that the federal government dictates a surcharge to be charged by the local distributor to the ultimate end user. For the previous forty years of regulation under the Natural Gas Act, the determination of charges at the local level had been reserved exclusively to state regulators, in "an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 521 (1947). The House provision, section 410 of H.R. 8444, 95th Cong., 1st Sess. (1977), provided for passthrough of incremental pricing charges to local users, while the Senate provision, section 29 of H.R. 5289, 95th Cong., 1st Sess. (1977), did not. See Conference Report, *supra* note 5, at 94, 1978 U.S. Code Cong. & Admin. News at 9011 ("The requirements of the Senate passed legislation applied only to interstate pipelines and not to intrastate pipelines or to local distribution companies.")

mandatory phases (App. 24a). This sheer speculation about what Congress "would have" done lacks support in this Court's precedents, which consistently test severability by examining the actual intention of the enacting Congress in adopting the particular program it did.[31] Instead of examining what Congress actually intended, the court of appeals departed from the judicial function and assumed the legislative one of choosing freely among the universe of available legislative options. This Court should conclude that legislative review is not severable from this particular statutory scheme. Since respondents therefore lack standing, the court of appeals should have dismissed the petitions for review without adjudicating the merits of the constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1982.

[31] *See, e.g., Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973) (provisions cannot be severed when that would "create a program quite different from the one the legislature actually adopted").

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Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office-Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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IN THE

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OCTOBER TERM, 1981

THE PROCESS GAS CONSUMERS GROUP,
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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1]In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution — that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

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v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

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[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC: [3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

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[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

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[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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